

No. 20-0291

In the Supreme Court of Texas

In re Greg Abbott, Governor of the State of Texas, and Ken Paxton,
Attorney General of the State of Texas,

Relators.

On Petition for Writ of Mandamus
To the 459th District Court of Travis County
Petition from Amici Curiae in Opposition of the Writ of Mandamus

Travis County, Texas

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Hon. David Walberg

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are Travis County, Texas, Travis County District Judges who preside over criminal dockets, Travis County Court at Law Judges who preside over criminal dockets, Travis County Justices of the Peace, the Travis County District Attorney, and the Travis County Sheriff, all of whom have sworn to faithfully execute the duties of their respective offices and to preserve, protect, and defend the Constitution and laws of the United States and of this State. They have a strong interest in this case because the Governor's Order offends the Constitution's separation of powers and could interfere with their ability to exercise their constitutional powers and duties. Accordingly, Amici Curiae Travis County, Texas, et al., file this Brief to be considered by this Court.

ARGUMENT

The coronavirus outbreak is undoubtedly wreaking havoc on everything from our health to our sense of safety to our economy. It should not, however, wreak havoc on the fundamental constitutional principles on which our democracy relies, such as the separation of powers doctrine. In fact, it is precisely now in these times of fear, uncertainty, and great loss of human life and personal liberties that we must fervently guard the careful distribution of power prescribed by the founders. As articulated by James Madison, “the preservation of liberty requires that the three

great departments of power should be separate and distinct.”¹ Otherwise, the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many. . . may justly be pronounced the very definition of tyranny.”² Critical in preserving that balance between these branches is the ability of the judiciary and of prosecutors to fulfill their constitutional duties without the interference of the executive branch.

On March 29, 2020, Governor Abbott issued an Executive Order, GA-13, which not only raises serious concerns about Due Process and the individual constitutional rights of the accused, but also violates the separation of powers doctrine. Although the Amici support the separation of powers to ensure against the violation of an individual’s constitutional rights, this briefing focuses on the interests of the officeholders who have constitutional duties to fulfill, and defers to the parties and Amici representing the accused and detained for discussion of the specific legal and constitutional arguments articulating the violation of specific individuals’ rights asserted in response to GA-13. This brief addresses the Governor’s overreach and the resultant violation of the separation of powers clause.

The Trial Court properly exercised its jurisdiction to prohibit enforcement of GA-13, which directly and expressly invades the province of the judicial and legislative branches and undermines their effectiveness. Furthermore, GA-13 runs

¹ *The Federalist No. 47*, at 301 (J. Madison) (C. Rossiter ed. 1961).

² *Id.*

roughshod over prosecutorial discretion, prohibiting those most directly involved and informed of the circumstances of each case from faithfully performing their constitutional duty to safeguard and support the civil liberties of the accused. The issuance of such an order and its enforcement are *ultra vires* acts over which the Trial Court had jurisdiction and a duty to enjoin. As such, this writ of mandamus should be denied.

The separation of powers among branches of government is fundamental in our country's and our state's history. "This separation of powers provision reflects a belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of power in a single branch of government."³ The Texas Constitution expressly provides for the separation of powers in Article II § 1; it states:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

The separation of powers serves two principal purposes. First, it attempts to prevent excessive concentration of power in the hands of any particular officer who might

³ *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Cr. App. 1990).
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then act arbitrarily. Second, it promotes effective government by assigning functions to the branches of government best suited to discharge them.⁴

The Separation of Powers Clause may be violated in two ways. First, it is violated when one branch of government assumes, or is delegated, to whatever degree, a power that is more “properly attached” to another branch.⁵ Second, the provision is also violated when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.⁶ Under the “explicit prohibition against one government branch exercising a power attached to another,” exceptions to the constitutionally mandated separation of powers may “never be implied in the least; they must be ‘expressly permitted’ by the Constitution itself.”⁷

When the Constitution confers a particular power to one department, it is presumed to be an exclusive delegation, unless it is otherwise made express in the Constitution itself.⁸ Specifically, “when the Constitution defines the duties of an agency of the government, the Legislature is without authority to add or take away from those powers or duties or substantially alter them.”⁹ Any attempt by one of the departments to exercise, or to unduly interfere with, a power assigned to another

⁴ See, H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 Texas L. Rev. 1337, 1341 (1990).

⁵ *Ex parte Giles*, 502 S.W.2d 774, 786 (Tex. Crim. App, 1973).

⁶ *Armadillo*, 802 S.W.2d at 239.

⁷ *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001); *Fin. Comm’n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2013).

⁸ *Ferguson v. Wilcox*, 28 S.W.2d 526, 533 (1930).

⁹ *Id.* at 532.

department is “null and void.”¹⁰ And when one department actually exercises a power of another (as opposed to merely interfering), it violates separation of powers to do so “to whatever degree.”¹¹ Here, in GA-13, the Governor goes beyond interfering with the powers of the judicial and legislative branches and actually attempts to exercise the power exclusively granted to those branches, respectively. The Governor’s order is a violation of the separation of powers because it is an attempt to exercise, or to unduly interfere with, a power assigned to other departments, and it undermines the effective operation of government.

I. In GA-13, the Governor unconstitutionally exercises power conferred exclusively to the judicial branch.

For the separation of powers principle to operate effectively as intended, there must be a reasonable and proper exercise of power by each branch and a harmonious cooperation among the three. The judiciary is especially vulnerable to a breakdown of this cooperation, because it depends entirely upon the legislative and executive branches for the practical enforcement of its decrees, and it has little effective recourse when those branches are derelict in their duties toward it. When, therefore, the necessary spirit of cooperation fails, the judiciary must resort to its inherent power to ensure that it will have the means to discharge its responsibilities. GA-13 violates the separation of powers doctrine because it infringes on the constitutionally

¹⁰ *Giles*, 502 S.W.2d at 780; *State ex rel. Smith v. Blackwell*, 500 S.W.2d 97, 101 (Tex. Crim. App. 1973).

¹¹ *Armadillo*, 802 S.W.2d at 239.

ascribed powers and duties of both the Texas judiciary and prosecutors and prevents judges and prosecutors from effectively exercising those duties without threat of criminal prosecution for contradicting GA-13. When applied as written, GA-13 would also infringe on the appellate courts' ability to exercise judicial discretion.

A. GA-13 violates the separation of powers doctrine by precluding presiding judges and courts from exercising their constitutional powers and duties.

The Texas Constitution explicitly vests the judicial power of the State in the courts.¹² In general terms, the jurisdiction that the Constitution grants under Article V ensures that “courts are [able] to exercise that portion of the judicial power allocated to them unimpeded by the supervision of any other” authority.¹³ This jurisdiction encompasses the “power to hear and determine the matter in controversy according to the established rules of law.” The judicial power is divided among these various named courts by means of express grants of "jurisdiction" contained in the constitution and statutes.

Both implied and inherent powers of the judiciary exist in Texas, each with separate and independent meaning. The inherent judicial power of a court is not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain

¹² Tex. Const. art. V, § 1.

¹³ *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933).

duties and responsibilities.¹⁴ The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity.¹⁵ The implied powers of a court do not stand on such an independent basis as those described as inherent.¹⁶ Though not directly or expressly granted by constitutional or legislative enactment, implied powers are those which can and ought to be implied from an express grant of power.¹⁷

GA-13 overreaches into both the implied and inherent powers of the judiciary. The Texas Constitution specifically establishes that it is the unique role of the judiciary to make individualized decisions governing bail and pretrial release. Section 11 of the Texas Bill of Rights requires that individuals accused of “violent crimes” are afforded due process and that the person’s bail may only be denied “by a district judge in this State.”¹⁸ When a pretrial detainee violates their conditions of release, bail may only be rescinded “if a judge or magistrate in this state determines by a preponderance of the evidence at a subsequent hearing that the person violated a condition of release related to the safety of a victim of the alleged offense or to the safety of the community.”¹⁹ And even for emergency protection orders involving

¹⁴ *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 396 (Tex. 1979).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 399.

¹⁸ Tex. Const. art. I, § 11a.

¹⁹ *Id.* at § 11b.

family violence, someone’s pretrial liberty may only be proscribed if “a judge or magistrate in this state determines by a preponderance of the evidence that the person violated the order or engaged in the conduct constituting the offense.”²⁰ In every case, pretrial liberty may only be circumscribed by judges and magistrates in this State—not by the executive branch, under a declaration of emergency or otherwise.

Furthermore, the portions of GA-13 that override or suspend specific provisions of the Texas Code of Criminal Procedure also violate the separation of powers doctrine because unlike the Legislature, the executive branch lacks authority to define procedural parameters for the judiciary. And though the Legislature may “define certain parameters within the operation of the judicial branch” by enacting laws like the Code of Criminal Procedure, neither it nor the governor may “interfere with the powers of the judicial branch so as to usurp those powers.”²¹

The Governor’s reliance on his unique authority to suspend regulatory statutes to cope with a disaster is but a thin veil to the overreach of GA-13. The Code of Criminal Procedure is not a “regulatory statute.”²² Any other interpretation ignores the fundamental principal of “three distinct departments, each of which shall be confined to a separate body of magistracy.”²³

²⁰ *Id.* at § 11c.

²¹ *Wilson-Everett v. Christus St. Joseph*, 242 S.W.3d 799, 802 (Tex. App. — Houston [14th] 2007, pet. denied).

²² Amici Curiae refer the Court to Plaintiff’s App. for TI (¶ 43-48, and Amicus Curiae Beal’s brief in its entirety for a full analysis of “regulatory statute” and discussion of Tex. Gov’t Code § 418’s application to GA-13.

²³ Tex. Const. art. II, § 1.

B. GA-13 violates the separation of powers doctrine by interfering with prosecutors' constitutional and ethical duties.

GA-13 further interferes with the functions of the judicial branch because it limits prosecutorial discretion and could prevent prosecutors from effectively exercising their constitutional duty to seek justice and to avoid encroaching on defendants' civil liberties.

The separation of powers doctrine provides for three branches of government, each of which is forbidden from exercising powers attached to one of the other branches.²⁴ County and district attorneys are included within the judicial branch pursuant to article V.²⁵ As such, the district and county attorneys are entitled to protection under the separation of powers doctrine.²⁶ Thus, neither the Governor nor the Legislature can remove or abridge their exclusive prosecutorial function unless authorized by an express constitutional provision.²⁷

Although the duties of district and county attorneys are not enumerated in Article V, § 21, Texas courts have long recognized that, along with various civil duties, their primary function, is “to prosecute the pleas of the state in criminal cases.”²⁸ We must also remember that a prosecutor's duty is not to convict, but to

²⁴ *Id.*

²⁵ Tex. Const. art. V, § 21; *Meshell v. State*, 739 S.W.2d 246, 253 n.9 (Tex. Crim. App. 1987).

²⁶ See *Meshell*, 739 S.W.2d at 253.

²⁷ *Meshell*, 739 S.W. 2d at 254-255; *Maud v. Terrell*, 200 S.W. 375, 376 (Tex. 1918); *Adamson v. Connally*, 112 S.W.2d 287, 290 (Tex.Civ.App.--Eastland 1937, no writ); *American Liberty Pipe Co. v. Agey*, 167 S.W.2d 580, 583 (Tex.Civ.App.--Austin, 1942) *aff'd.*, 172 S.W.2d 972 (1943).

²⁸ *Brady v. Brooks*, 89 S.W. 1052, 1056 (Tex 1905), *Accord*, *Driscoll v. Harris County Com'rs Court*, 688 S.W.2d 569 (Tex.App. -- Houston [14th] 1984, writ ref. n.r.e.) (opinion on

see that justice is done.²⁹ Exercising discretion to ensure equal application of the law and procedural justice is consistent with the prosecutor's ethical duty to seek justice.³⁰ Prosecutorial discretion in all phases of a prosecution is essential to prosecutors' ability to adhere to the ethical and constitutional duties that fall squarely upon their shoulders. GA-13 removes and abridges a prosecutor's ability to weigh the individual circumstances of each defendant and case, and dictates certain outcomes with a broad brush. Without an express constitutional provision authorizing that interference, GA-13 violates the separation of powers doctrine..³¹

Furthermore, GA-13 threatens the independent policymaking authority of each duly elected county and district attorney. As recognized by the Texas Supreme Court over one hundred sixty years ago, "[t]he officers of each department are chosen by the people, with reference to their capacity and general fitness to discharge the peculiar duties of that department. They have a right to expect, that the respective duties allotted to each department shall be performed by those they have chosen to perform them."³² Each elected official and each branch of government may only exercise that authority authorized by the constitution and the laws that flow from them. Plainly put, the executive branch may not "encroach on substantive judicial

rehearing); *Shepperd v. Alaniz*, 303 S.W.2d 846, 849 (Tex.Civ.App. -- San Antonio 1957, no writ).

²⁹ Tex. Code Crim. Proc. art. 2.01.

³⁰ Model Rules of Prof'l Conduct R. 3.8 Cmt. 1 (2009) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

³¹ See generally, *Meshell*, 739 S.W.2d at 254-255.

³² *Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 317, 336 (Tex. 1859).

powers” or “interfere with the powers of the judicial branch.”³³ GA-13 is a violation of the separation of powers doctrine and is therefore a nullity and should not remain in effect nor be enforced.³⁴

II. In GA-13, the Governor unconstitutionally exercises power conferred exclusively on the legislative branch.

Our Constitution vests all lawmaking power in the Legislature of the State of Texas.³⁵ Provisions of our Constitution serve only as a limitation on power of the Legislature and not as a grant of power.³⁶ This includes the power to make, alter, and repeal laws, in accordance with the other provisions of the Constitution. Tex. Const. art. 5, § 31, explicitly grants the Legislature ultimate authority over judicial “administration,” although this authority does not permit the Legislature to infringe upon the substantive power of the judicial department under the guise of establishing “rules of court,” thus rendering the separation of powers doctrine meaningless.³⁷ Furthermore, the Legislature also has “complete authority to pass any law regulating the means, manner, and mode of assertion of any of [criminal defendant’s] rights in [] court,” provided that those procedures do not violate defendants’ constitutional rights or infringe on the constitutional decision-making authority of the judiciary.³⁸

³³ *Wilson-Everett*, 242 S.W.3d at 802.

³⁴ *Giles*, 502 S.W.2d at 780.

³⁵ *Walker v. Baker*, 196 S.W.2d 324, 328 (Tex. 1946).

³⁶ *See Gov’t Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 563 (Tex. 1963).

³⁷ Tex. Const. art. II, § 1.

³⁸ *Johnson v. State*, 58 S.W. 60, 61 (Tex. Crim. App. 1900); *See, Ex parte Ancira*, 942 S.W.2d 46, 48 (Tex. App.—Houston [14th] 1997, no writ) (explaining that the Legislature “wields
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Here, GA-13 runs afoul of the separation of powers doctrine because it ignores the Legislature’s exclusive authority over the administration of the courts as the Governor attempts to wield powers that he, as the state executive, has not been granted by the constitution or otherwise. The Legislature vested in the governor the authority to suspend certain “regulatory statutes prescribing the procedures for conduct of state business or the orders or rules of a state agency” in order to cope with a disaster. GA-13 goes beyond that specific authority.

By suspending provisions of the Code of Criminal Procedure, and by proscribing a certain outcome in a criminal case, the Governor attempts to make a judicial decision, attempts to exercise authority over judicial administration and regulate the means, manner, and mode of assertion of any of criminal defendants’ rights in court, and further attempts to exercise a power attached to the Legislature. In doing so, the Governor violates the separation of powers doctrine because he usurps authority that has not been granted to him by the Texas Constitution. As such, this mandamus should be denied.

III. CONCLUSION AND PRAYER

The Trial Court properly exercised its jurisdiction to prohibit enforcement of GA-13 which directly and expressly invades the province of the judicial and legislative branches. GA-13 upends the balance between branches over government

ultimate constitutional authority over judicial administration” and holding that Article 17.151 of the Code of Criminal Procedure was constitutionally enacted by the Legislature without infringing on the powers of the Judiciary).

and interfering with the ability of the judiciary and of prosecutors to fulfill their constitutional duties without the interference of the executive branch. The issuance of such an order and its enforcement are *ultra vires* acts over which the Trial Court had jurisdiction and a duty to enjoin. Amici respectfully request that the judgment of the Trial Court be left undisturbed, that the emergency stay be vacated, and that this mandamus be denied.

WHEREFORE, PREMISES CONSIDERED, amici respectfully request that the Court affirm the Trial Court's final judgment in favor of Plaintiffs.

Respectfully submitted,

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FEE DISCLOSURE

Pursuant to Tex. R. App. P. 11, the Travis County Attorney's Office discloses that no specific fees were paid or are to be paid for preparing this brief, as it was prepared by an Assistant Travis County Attorney.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above and foregoing by electronically delivering it to all parties, as registered participants in the Texas E-filing document filing system, on this the 21 day of April 2020.

/s/ Sherine E. Thomas

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